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No. 87-901

In the Supreme Court of the United States

OCTOBER TERM, 1987

KHUSHRO GHANDHI, ET AL., PETITIONERS

v.

GERALD FAYED, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
JOHN F. CORDES
MARK W. PENNAK
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

12 pp

QUESTIONS PRESENTED

1. Whether a government informant acting contrary to the instructions of federal agents in allegedly carrying out unconstitutional actions was a "government actor" for purposes of *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

2. Whether petitioners waived any claim that federal agents were grossly negligent in failing to supervise an informant.

3. Whether the "clearly erroneous" standard of Fed. R. Civ. P. 52(a) applies to factual findings made by the district court in a case involving a claim under the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 823 F.2d 959. The opinion of the district court (Pet. App. A11-A16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1987, and rehearing was denied on August 31, 1987. The petition for a writ of certiorari was filed on Monday, November 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In this *Bivens* action,[1], petitioners, members and former members of the National Caucus of Labor Committees (NCLC), allege that respondents, two agents of the

[1] *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

Federal Bureau of Investigation (FBI), Gerald Fayed and Philip Mercado, and a paid informant, Vernon Higgins, engaged in actions violative of petitioners' rights under the First, Fourth, and Ninth Amendments of the Constitution in the course of investigating the NCLC in the early 1970s.

1. Petitioners' original complaint in this case named as defendants the FBI, the Police Department of the City of Detroit, as well as numerous individual officers of the FBI, including respondents Gerald Fayed and Philip Mercado, and individual officers of the Detroit Police, and an informant, respondent Vernon Higgins. The court of appeals affirmed dismissal of all of petitioners' claims against all defendants with the exception of petitioners' *Bivens* claims against Agents Fayed and Mercado and informant Higgins. *Ghandi* v. *Police Dep't of Detroit,* 747 F.2d 338 (1984).

On remand, the district court conducted a five-day trial on petitioners' claims against these remaining defendants. On January 23, 1986, at the close of plaintiffs' case, the district court granted the motions of defendants Fayed and Mercado for dismissal under Rule 41(b) of the Federal Rules of Civil Procedure, finding "as a matter of fact," that Agents Fayed and Mercado "did not place [Higgins in the NCLC and] * * * that they did not instruct him or encourage him to engage in activities designed to disrupt Plaintiffs' activities or discredit their organizations and they did not give him instructions to commit illegal acts" (Pet. App. A12). The court further found that these defendants had told Higgins to "be a follower not a leader and gave him no instructions to steal mail or in any way engage in the activities that were condemned by the Sixth Circuit" (*id.* at A13). Noting that all three defendants had been subjected to cross-examination, the court concluded that Rule 41(b) dismissal was appropriate because "there is no evidence that either of these agents authorized, directed or approved unconstitutional conduct by Higgins" (*ibid.*).

The district court also granted a Rule 41(b) dismissal on the constitutional claims against respondent Higgins. The district court reasoned that it was unnecessary to make findings of fact "as to whether Higgins did or did not commit any specific acts * * * except to find that if any of such acts were committed, he committed them on his own behalf and not on instructions or on behalf of Agents Mercado or Fayed" (Pet. App. A14). The court thus reasoned that "there can be no violation of First Amendment rights by Higgins because an individual acting on his own cannot deprive a person of First Amendment rights, there must be governmental action" (*ibid.*).

2. The court of appeals affirmed. It concluded that it need not review petitioners' allegations of gross negligence, since they had been neither included in the pretrial order nor actively pursued at trial (Pet. App. A6). The court thus upheld the district court's dismissal as to Agents Fayed and Mercado, noting that petitioners had not even challenged as clearly erroneous the findings of fact pertaining to their alleged authorization of unconstitutional action by defendant Higgins.[2]

As to the dismissal of defendant Higgins, the court rejected "plaintiffs' invitation to establish a per se rule that the activities of paid government informants must always be considered government action" (Pet. App. A8). Rather, the court held that "[t]he determination of government action depends on the facts of each case, through 'sifting facts and weighing circumstances' " (Pet. App. A8, quoting *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961)). The court of appeals held that under that standard, Higgins was not a "governmental actor[]" because the district court specifically found that

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[2] Judge Jones concurred on the understanding that the dismissal as to the two FBI agents was being "affirmed solely because plaintiffs failed to preserve such claims [of gross negligence] for trial" (Pet. App. A10).

any unconstitutional actions committed by Higgins "were committed . . . on his own behalf," that Higgins was already a member of the NCLC when he approached the FBI and offered to become an informant, and that Higgins was paid in that role solely on "a c.o.d. basis" (Pet. App. A8-A9 & n.5).

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or that of any other court of appeals. The court below simply applied the correct legal standards to the facts of this case; its decision is therefore fact-bound and limited to the particular facts of this case. Accordingly, certiorari is not warranted.

1. Petitioners repeat in this Court their claim that "Higgins' status as a paid informant per se establishes that he was a governmental actor" (Pet. App. A7). This claim is wholly without merit.

Petitioners place their principal reliance on this Court's decision in *Hoffa* v. *United States,* 385 U.S. 293 (1966). In that case, while refusing to invalidate a conviction, this Court observed that a government informant is subject to constitutional restrictions (385 U.S. at 311). There, federal agents had directed the informant "to report to the federal authorities any evidence of wrongdoing that he discovered" (*id.* at 298), and the informant thereafter reported defendant's conversations, precisely as directed (*id.* at 296). There was thus no suggestion in *Hoffa* that the informant exceeded the bounds of his instructions. Indeed it was clear that he was in fact acting on behalf of the government in undertaking the challenged activity. In this case, by contrast, the informant engaged in conduct completely at variance with his instructions from the government agents.[3]

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[3] The other authorities relied on by petitioners are of no greater assistance than *Hoffa*. In *United States* v. *Cella,* 568 F.2d 1266, 1282

Petitioners assert that a per se rule is justified because even informants like Higgins act under the "color of law" (Pet. 12-13). However, as noted by the court of appeals, " 'although . . . conduct satisfying the state-action requirement . . . satisfies the statutory requirement [under 42 U.S.C. 1983] of action under color of state law, it does not follow from that that all conduct that satisfies the under-color-of-state-law requirement would satisfy the . . . requirement of state action' " (Pet. App. A8 n.4, quoting *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 935 n.18 (1982)). As the court of appeals held, a factual inquiry is necessary to determine whether there has been state action. See also *Monroe* v. *Pape*, 365 U.S. 167, 185 (1961); *Screws* v. *United States*, 325 U.S. 91, 111 (1945). After such an inquiry, the district court properly concluded that there was no such action here.

2. Petitioners' fact-specific assertion (Pet. 14-18) that the court of appeals erred in failing to construe the pretrial order liberally under Fed. R. Civ. P. 16 to preserve their gross negligence claims against Agents Fayed and Mercado does not merit review by this Court. The plain language of Rule 16[4] would be enough by itself to support the court's refusal to consider the claims, since "[t]he pretrial order filed in the present case contains no allegations of gross negligence, callous or deliberate indifference, or reckless disregard" (Pet. App. A6 (footnote omitted); see *id.* at A39-A45). But in fact, the court of ap-

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(9th Cir. 1978), *United States* v. *Upton*, 502 F. Supp. 1193 (D.N.H. 1980), and the cases cited by petitioners (Pet. 9) involving conversations recorded under 18 U.S.C. 2511, there was no informant conduct beyond what the law enforcement agents had authorized.

[4] Rule 16(e) states that the pretrial order "shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice."

peals' refusal to consider the claims was not based solely on the pretrial order. As that court explained (Pet. App. A6 n.1), petitioners not only failed to request the district court to exercise its Rule 16 authority to modify the pretrail order "to prevent manifest injustice" (Fed. R. Civ. P. 16(e)), they "never adequately brought to the court's attention that they were attempting to hold the agents liable on a theory of gross negligence or deliberate indifference" (Pet. App. A6 n.1).

Thus, petitioners "made no offer of proof as to their alleged claims of gross negligence or deliberate indifference" as required by Fed. R. Evid. 103(a)(2) (Pet. App. A6 n.1). Indeed, they never advised the district court of their gross negligence claims at all, despite the court's repeated statements indicating its view "that negligence was not at issue" (*ibid.*). Instead, petitioners specifically agreed that the pretrial order stated the issues for trial (*ibid.*). The court of appeals is clearly correct in stating that "[petitioners] were under some obligation during [their] colloquies [with the district court] to inform the court of their view of the relevant issues" (*ibid.*).

Even in the court of appeals, petitioners did not assert that the district court erred by failing to construe Rule 16 liberally; they claimed only that they had presented the gross negligence claim during trial because they had asserted that the evidence relating to negligence that the district court had excluded was relevant.[5] Plainly, petitioners' claim that the courts below erred in failing to construe Rule 16 liberally is without merit – petitioners never even requested such a construction from either the district court or the court of appeals.

3. Petitioners' final contention is that the court of appeals applied the wrong standard in reviewing the district

[5] The court of appeals quite properly rejected this claim, noting that simple negligence does not support an action for violation of constitutional rights (Pet. App. A6 n.2).

court's factual findings. They do not assert that the district court's findings, which were based in substantial part on the credibility of the witnesses (including all three respondents (Pet. App. A13)) were clearly erroneous. They claim only that because this is a First Amendment case, application of a de novo standard to review of factual findings is required (Pet. 18). This contention is frivolous.

The clearly erroneous standard of Fed. R. Civ. P. 52(a) applies to review of factual findings in cases raising First Amendment claims, as to all other cases. Petitioners rely principally on the statement in *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984), that in First Amendment cases the courts of appeals have an obligation to " 'make an independent examination of the whole record' " (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964)). But the Court in *Bose* also emphasized that the "standard of review [in such cases] must be faithful to both Rule 52(a) and the rule of independent review" (*ibid.*).[6] The Court explained (466 U.S. at 499-500):

> The conflict between the two rules is in some respects more apparent than real. The *New York Times* rule [of independent review] emphasizes the need for an appellate court to make an independent examination of the entire record; Rule 52(a) never forbids such an examination, and indeed our seminal decision on the Rule expressly contemplated a review of the entire

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[6] The Court also stressed that "[w]e have repeatedly held that [Rule 52(a)] means what it says." 466 U.S. at 498, citing *Inwood Laboratories* v. *Ives Laboratories*, 456 U.S. 844, 855 (1982); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394-396 (1948). See also *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573-576 (1984); *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 713-714 (1986).

> record, stating that a "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, [333 U.S. 364] at 395 (emphasis supplied). Moreover, Rule 52(a)) commands that "due regard" shall be given to the trial judge's opportunity to observe the demeanor of the witnesses; the constitutionally based rule of independent review permits this opportunity to be given its due.

In this case, the court of appeals followed precisely the procedure described in *Bose*. It meticulously examined the entire record before sustaining the district court's findings (Pet. App. A6-A9). The fact that it also gave "due regard" (466 U.S. at 499) to the district court's assessment of respondents' credibility surely affords petitioners no legitimate cause for complaint.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
JOHN F. CORDES
MARK W. PENNAK
Attorneys

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